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July 2, 1984

NON-RESPONSIVE

David Hird
U.S. Department of Justice
Hazardous Waste Section
Land & Natural Resources Division
Room 1230
Washington, D.C. 20530

Re: U.S. v. Reilly Tar & Chemical Corporation
File No. Civ. 4-80-469

Dear David:

Enclosed are (1) the article on discovery of experts I alluded to at our meeting last Thursday and (2) the provision of the Minnesota Superfund [Minn. Stat. § 115B.04, subd. 1 (a)] establishing joint and several liability to the United States.

Very truly yours,

STEPHEN SHAKMAN
Special Assistant
Attorney General

SS:jh
enclosure
cc: Robert E. Leininger

pollutant or contaminant, and either selected the facility to which it was transported or disposed of it in a manner contrary to law.

Subd. 2. **Employees and employers.** When a person who is responsible for a release or threatened release as provided in subdivision 1 is an employee who is acting in the scope of his employment:

(a) The employee is subject to liability under section 115B.04 or 115B.05 only if his conduct with respect to the hazardous substance was negligent under circumstances in which he knew that the substance was hazardous and that his conduct, if negligent, could result in serious harm.

(b) His employer shall be considered a person responsible for the release or threatened release and is subject to liability under section 115B.04 or 115B.05 regardless of the degree of care exercised by the employee.

Subd. 3. **Owner of real property.** An owner of real property is not a person responsible for the release or threatened release of a hazardous substance from a facility in or on the property unless that person:

(a) was engaged in the business of generating, transporting, storing, treating, or disposing of a hazardous substance at the facility or disposing of waste at the facility, or knowingly permitted others to engage in such a business at the facility;

(b) knowingly permitted any person to make regular use of the facility for disposal of waste;

(c) knowingly permitted any person to use the facility for disposal of a hazardous substance;

(d) knew or reasonably should have known that a hazardous substance was located in or on the facility at the time right, title, or interest in the property was first acquired by the person and engaged in conduct by which he associated himself with the release; or

(e) took action which significantly contributed to the release after he knew or reasonably should have known that a hazardous substance was located in or on the facility.

For the purpose of clause (d), a written warranty, representation, or undertaking, which is set forth in an instrument conveying any right, title or interest in the real property and which is executed by the person conveying the right, title or interest, or which is set forth in any memorandum of any such instrument executed for the purpose of recording, is admissible as evidence of whether the person acquiring any right, title, or interest in the real property knew or reasonably should have known that a hazardous substance was located in or on the facility.

Any liability which accrues to an owner of real property under sections 115B.01 to 115B.15 does not accrue to any other person who is not an owner of the real property merely because the other person holds some right, title, or interest in the real property.

An owner of real property on which a public utility easement is located is not a responsible person with respect to any release caused by any act or omission of the public utility which holds the easement in carrying out the specific use for which the easement was granted.

History: *1983 c 121 s 3*

115B.04 LIABILITY FOR RESPONSE COSTS AND NATURAL RESOURCES; LIMITATIONS AND DEFENSES.

Subdivision 1. **Liability.** Except as otherwise provided in subdivisions 2 to 12, and notwithstanding any other provision or rule of law, any person who is

responsible for a release or threatened release of a hazardous substance from a facility is strictly liable, jointly and severally, for the following response costs and damages which result from the release or threatened release or to which the release or threatened release significantly contributes:

(a) All reasonable and necessary response costs incurred by the state, a political subdivision of the state or the United States;

(b) All reasonable and necessary removal costs incurred by any person; and

(c) All damages for any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss.

Subd. 2. **Liability for pollutant or contaminant excluded.** There is no liability under this section for response costs or damages which result from the release of a pollutant or contaminant.

Subd. 3. **Liability for a threatened release.** Liability under this section for a threatened release of a hazardous substance is limited to the recovery by the agency of reasonable and necessary response costs as provided in section 115B.17, subdivision 6.

Subd. 4. **Liability of political subdivisions.** The liability of a political subdivision under this section is subject to the limits imposed under section 466.04, subdivision 1.

Subd. 5. **Transportation of household refuse.** A person who accepts only household refuse for transport to a treatment or disposal facility is not liable under this section for the release or threatened release of any hazardous substance unless he knew or reasonably should have known that the hazardous substance was present in the refuse. For the purpose of this subdivision, household refuse means garbage, trash, or septic tank sanitary wastes generated by single or multiple residences, hotels, motels, restaurants and other similar facilities.

Subd. 6. **Defense to certain claims by political subdivisions and private persons.** It is a defense to a claim by a political subdivision or private person for recovery of the costs of its response actions under this section that the hazardous substance released from the facility was placed or came to be located in or on the facility before April 1, 1982, and that the response actions of the political subdivision or private person were not authorized by the agency as provided in section 115B.17, subdivision 12. This defense applies only to response costs incurred on or after July 1, 1983.

Subd. 7. **Defense for intervening acts.** It is a defense to liability under this section that the release or threatened release was caused solely by:

(a) An act of God;

(b) An act of war;

(c) An act of vandalism or sabotage; or

(d) An act or omission of a third party or the plaintiff.

"Third party" for the purposes of clause (d) does not include an employee or agent of the defendant, or a person in the chain of responsibility for the generation, transportation, storage, treatment, or disposal of the hazardous substance.

The defenses provided in clauses (c) and (d) apply only if the defendant establishes that he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of the hazardous substance in light of all relevant facts and circumstances which he knew or should have known, and that he took precautions against foreseeable acts or omissions and the consequences that could foreseeably result from those acts or omissions.

Subd. 8. **Intervening acts** environmental protection agen release of a hazardous subs release, the persons responsi 115B.01 to 115B.15 for any s another facility to which it ha

Subd. 9. **Releases sub fund.** It is a defense to liabili

(a) The release or threat defined under section 115A.03 section 116.07 or pursuant to United States Code section 69 identified in the permit, and th for release of that substance;

(b) The hazardous substan state permit and the release is

(c) The release resulted fro a part of the public record of issued or modified under feder permit;

(d) The release was any p and the emission or discharge compliance with control rules law;

(e) The release was the publicly owned treatment wor compliance with, applicable p under state and federal law; o

(f) Liability has been assu 42 United States Code section

Subd. 10. **Natural** any injury to, destruction of,

(a) The natural resources irretrievable commitment of n environmental impact stateme tal analysis for a project or fac or license; and

(b) The project or facility license.

Subd. 11. **Rendering as** under this section that the re omitted in preparation for, or to the director or agency pu national hazardous substanc Act, under 42 United States coordinator appointed under release of a hazardous subst

Subd. 12. **Burden of** provided in subdivisions 6 defense by a preponderance

History: *1983 c 121 s*

Subd. 8. **Intervening acts of public agencies.** When the agency or the federal environmental protection agency assumes control over any release or threatened release of a hazardous substance by taking removal actions at the site of the release, the persons responsible for the release are not liable under sections 115B.01 to 115B.15 for any subsequent release of the hazardous substance from another facility to which it has been removed.

Subd. 9. **Releases subject to certain permits or standards; federal post-closure fund.** It is a defense to liability under this section that:

(a) The release or threatened release was from a hazardous waste facility as defined under section 115A.03, for which a permit had been issued pursuant to section 116.07 or pursuant to subtitle C of the Solid Waste Disposal Act, 42 United States Code section 6921 et seq., the hazardous substance was specifically identified in the permit, and the release was within the limits allowed in the permit for release of that substance;

(b) The hazardous substance released was specifically identified in a federal or state permit and the release is within the limits allowed in the permit;

(c) The release resulted from circumstances identified and reviewed and made a part of the public record of a federal or state agency with respect to a permit issued or modified under federal or state law, and the release conformed with the permit;

(d) The release was any part of an emission or discharge into the air or water and the emission or discharge was subject to a federal or state permit and was in compliance with control rules or regulations adopted pursuant to state or federal law;

(e) The release was the introduction of any hazardous substance into a publicly owned treatment works and the substance was specified in, and is in compliance with, applicable pretreatment standards specified for that substance under state and federal law; or

(f) Liability has been assumed by the federal post-closure liability fund under 42 United States Code section 9607(k).

Subd. 10. **Natural resources.** It is a defense to liability under this section, for any injury to, destruction of, or loss of natural resources that:

(a) The natural resources were specifically identified as an irreversible and irretrievable commitment of natural resources in an approved final state or federal environmental impact statement, or other comparable approved final environmental analysis for a project or facility which was the subject of a governmental permit or license; and

(b) The project or facility was being operated within the terms of its permit or license.

Subd. 11. **Rendering assistance in response actions.** It is a defense to liability under this section that the response costs or damages resulted from acts taken or omitted in preparation for, or in the course of rendering care, assistance, or advice to the director or agency pursuant to section 115B.17 or in accordance with the national hazardous substance response plan pursuant to the Federal Superfund Act, under 42 United States Code section 9605, or at the direction of an on-scene coordinator appointed under that plan, with respect to any release or threatened release of a hazardous substance.

Subd. 12. **Burden of proof for defenses.** Any person claiming a defense provided in subdivisions 6 to 11 has the burden to prove all elements of the defense by a preponderance of the evidence.

History: *1983 c 121 s 4*

Discovery of Experts

by Morgan Chu

Added in 1970, Rule 26(b)(4) of the Federal Rules of Civil Procedure was designed to untangle the mess of conflicting case law governing discovery from and about expert witnesses. In general, the rule has proven a success, but it has also created its own problems of interpretation. Consider the following problems:

- It is not always clear when the rule applies. By its terms, it applies to discovery of facts and opinions "acquired or developed in anticipation of litigation or for trial." When is a fact or opinion acquired or developed in anticipation of litigation?
- If the rule applies, how much discovery does it permit? Although the rule clearly allows greater discovery from experts expected to be called as witnesses than from those hired as consultants, how much discovery the rule allows as to either type of expert is still subject to dispute.
- How can experts be protected from unwarranted discovery?

Rule 26(b)(4) protects only those facts and opinions that an expert acquires or develops in anticipation of litigation or for trial. Facts the expert knew and opinions he held before litigation was anticipated are subject to the much broader discovery provisions of Rule 26(b)(1).

This distinction poses problems when a party is engaged in a business that by its very nature anticipates litigation. For example, in *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972), the court held that an insurance company examiner's report was not made in anticipation of litigation. At the time the report was prepared, the insurer had not yet consulted an attorney, *id.* at 371-72, and suit was not filed until 16 months later, *id.* at 371-74. However, as the *Thomas Organ* court observed, if the phrase "in anticipation of litigation" is too broadly construed, insurance companies will be able to hide their investigators' reports and their experts' opinions behind the protections of Rule 26(b)(4) and Rule 26(b)(3), which govern the work product doctrine and also use the phrase "in anticipation of litigation." *See generally Rakus v. Erie-Lackawanna R.R.*, 76 F.R.D. 145, 146 (W.D.N.Y. 1977); *Spaulding v. Denton*, 68 F.R.D. 342, 342-346 (D. Del. 1975).

The line between "materials assembled in the ordinary course of business," which are not afforded the protections of Rules 26(b)(3), or 26(b)(4) (*see* Advisory Committee Notes to Rule 26(b)(3), 48 F.R.D. 487, 501), and information obtained "in anticipation of litigation," which is protected, is disturbingly elusive. Some courts have narrowly defined the phrase "in anticipation of litigation." For example, in *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943 (E.D. Pa. 1976), the court stated that the threat of litigation "must be more real and imminent" than "matters which may or even likely will ultimately come to litigation." *Id.* at 948. Some courts even hold that litigation cannot be anticipated until very concrete claims have been made:

> Absent a specific showing by defendants that in this particular tender offer in early 1975 there was a clear threat of litigation "involving claims which had already arisen," we do not find defendants' contention that these documents are privileged "work product" persuasive.

Panter v. Marshall Field & Co., 80 F.R.D. 718, 725 n.6 (N.D. Ill. 1978). *See also Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 43 (D. Md. 1974).

In contrast, other courts have held that the mere possibility of future litigation is sufficient to make Rules 26(b)(3) and 26(b)(4) applicable. *E.g., United States v. Lipshy*, 1979-2 U.S. Tax Cas. ¶ 9628 at 88,279 (N.D. Tex. 1979) (shareholder and other suits were a possibility because of IRS inquiries); *In re Grand Jury Subpoena (John Doe, Inc.)*, 599 F.2d 504, 511 (2d Cir. 1979) (investigation to determine whether to file SEC reports and amended tax returns was "in anticipation of litigation"); *In re Grand Jury Investigation (Sun Oil Co.)*, 599 F.2d 1224, 1229 (3d Cir. 1979) (investigation of illegal

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payments was "in anticipation of litigation" because of the probability that illegal payments had in fact been made).

A presuit investigation will more likely be found to be in anticipation of litigation if it is conducted in a manner clearly beyond the ordinary course of business of the party. Thus, investigations by insurance company adjusters may not be "in anticipation of litigation," but special investigations of illegal payments may be. Also, Rule 26(b)(4) should more readily apply when an outside expert is specially retained in connection with a specific, well-defined legal matter. *See* Connors, *A New Look at an Old Concern—Protecting Expert Information from Discovery under the Federal Rules*, 18 DUQ. L. REV. 271, 287 (1980).

Two-Stage Process

Rule 26(b)(4) establishes a two-stage discovery process for experts expected to be called as witnesses at trial. First, "[a] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." FED. R. CIV. P. 26(b)(4)(A)(i). Second, "[u]pon motion, the court may order further discovery by other means, subject to [the payment of fees under certain circumstances]." FED. R. CIV. P. 26(b)(4)(A)(ii).

Because Rule 26(b)(4)(A) applies solely to a person who is an expert expected to be called as a witness at trial, there is always the possibility that opposing counsel will delay until just before trial deciding which experts will be his witnesses. Rule 26 (e)(1)(B), however, requires a party "seasonably to supplement" his responses to interrogatories asking about expert witnesses.

Courts have given teeth to this rule. In *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 454-457 (2d Cir. 1975), the defendant had responded to interrogatories regarding expert witnesses by identifying a certain expert, but had failed to indicate the substance of his testimony. Over plaintiff's objection, this expert was allowed to testify. A defense verdict resulted.

The Court of Appeals for the Second Circuit reversed, finding that the defendant's failure to respond properly to plaintiff's interrogatories denied plaintiff fair notice of defendant's theory of the case. In so doing, the court rejected the defendant's argument that the tests on which the expert's testimony was based were not completed until after the trial had started and that the defendant had no obligation to supplement its responses to the interrogatories once trial had begun. *See also Tabatchnick v. G.D. Searle & Co.*, 67 F.R.D. 49, 55 (D.N.J. 1975); *Wallace v. Shade Tobacco Growers Agricultural Ass'n*, 21 F.R. SERV. 2d 1130, 1132 (D. Mass. 1975).

Though Rule 26(b)(4)(A) appears to require interrogatories before other discovery of expert witnesses, the parties may agree to, or the court can order, a different procedure. *See Pearl Brewing Co. v. Joseph Schlitz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex. 1976). The *Pearl Brewing* court held that the interrogatories were not required before discovery by deposition or production of documents. *Id.* at 1137.

Unfortunately, Rule 26(b)(4)(A) is silent concerning the grounds on which a court may order further discovery after the service of interrogatories. A number of courts have taken a restrictive view and have not permitted further discovery absent unusual circumstances. For example, in *Lanza v. British European Airways, Ltd.*, M.D.L. Docket No. 147 (E.D.N.Y. filed March 17, 1976), summarized in Graham, *Discovery of Experts under Rule 26(b)(4) of the Federal Rules of Civil Procedures: Part I, an Analytical Study*, 1976 U. ILL. LAW FORUM 895, 918-19, the court denied a motion for depositions of experts based on its finding that the interrogatory answers were "adequate and within the spirit of Rule 26(b)(4)(A)(i)." The interrogatory answers, however, were summary recitals of the names of experts who would testify, the broad areas of their testimony, and a short paragraph stating that the experts would base their testimony on the exhibits and testimony presented at a public inquiry on the case of the airplane crash at issue.

Courts have also denied further discovery by document productions. *E.g., United States v. 145.31 Acres of Land*, 54 F.R.D. 359, 360 (M.D. Pa. 1972), *aff'd*, 485 F.2d 682 (3d Cir. 1973) (production of an appraiser's report in a condemnation action is not required since there was no compelling need for such discovery); *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202, 204 (N.D. Miss. 1972) (exceptional circumstances must be shown to justify production of an expert's report).

Other courts have taken a broader view, balancing the need for effective cross-examination against the possibility that a party will unfairly acquire information from an expert retained by the other party without the proper sharing of related costs. For example, in *Quadrini v. Sikorsky Aircraft Div.*, 74 F.R.D. 594 (D. Conn. 1977), the defendant sought to obtain reports prepared by the plaintiffs' experts. The plaintiffs argued that the defendant had to show "substantial need and undue hardship" to obtain the documents. *Id.* at 594. The court rejected this test, stating that expert testimony would be "crucial to the resolution of the complex and technical factual disputes in this case, and effective cross-examination will be essential." *Id.* at 595. In *In re IBM Peripheral EDP Devices Antitrust Litigation*, 77 F.R.D. 39, 41-42 (N.D. Cal. 1977), the court allowed further discovery under Rule 26(b)(4)(A)(ii), although it found IBM's document request to be too broad.

In a similar vein, the court in *Herbst v. ITT Corp.*, 65 F.R.D. 528 (D. Conn. 1975), permitted depositions of a party's two experts, noting that Rule 26(b)(4)(C)(ii) provides a mechanism to prevent one party from avoiding the cost of retaining his own expert. *Id.* at 531. Rule 26(b)(4)(C)(ii) provides, in part:

> [W]ith respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require . . . the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Thus, if a court allows further discovery of expert witnesses, it may order the party conducting such discovery to share in the cost of educating the experts about the facts of a case or the cost of having the experts conduct research in order to formulate an opinion. Discovery beyond initial interrogatories is often permitted by the courts, but the precise contours of what will be allowed under varying circumstances have yet to be established.

Exceptional Circumstances

Rule 26(b)(4)(B) provides that a party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial only if there are "exceptional circumstances" or if the expert is an examining physician as provided by Rule 35(b). Two major questions arise under this rule.

The first question is created by the Advisory Committee Note to Rule 26(b)(4)(B) which states that upon a "proper showing" a party may require another party to reveal the identity of expert consultants. Some courts have interpreted this comment to mean that the name, address, and other basic identifying information of an expert consultant may be obtained through interrogatories without a showing of exceptional circumstances. *E.g., Baki v. B.F. Diamond Constr. Co.*, 71 F.R.D. 179, 182 (D. Md. 1976); *Sea Colony, Inc. v. Continental Ins. Co.*, 63 F.R.D. 113, 114 (D. Del. 1974). *See also Arco Pipeline Co. v. S/S Trade Star*, 81 F.R.D. 416, 417 (E.D. Pa. 1978). *But see Perry v. W.S. Darley & Co.*, 54 F.R.D. 278, 280 (E.D. Wis. 1971).

The Court of Appeals for the Tenth Circuit is the only appellate court that has addressed this question. In *Ager v. Jane C. Stormont Hospital & Training School*, 622 F.2d 496 (10th Cir. 1980), the court held that "the identity, and other collateral information concerning an expert who is retained or specially employed in anticipation of litigation, but not expected to be called as a witness at trial, is not discoverable except as 'provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.'" *Id.* at 503. The *Ager* court based its decision on a number of factors, including its concern:

> (1) that once the identities of retained or specially employed experts are disclosed, they may be contacted and their records obtained and information normally non-discoverable under Rule 26(b)(4)(B) might be revealed;
>
> (2) that the opponent may attempt to compel an expert retained or specially employed by an adverse party to testify at trial even though the party retaining the expert does not intend to call him or her;
>
> (3) that a party may call his opponent to the stand and ask if certain experts were retained in anticipation of trial, but not called as witnesses, thereby leaving with the jury an inference that the retaining party is attempting to suppress adverse facts or opinions; and
>
> (4) that disclosure of the identities of nontestifying experts would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss certain types of claims with counsel.

Id. at 503.

Disclosing the identity of experts may lead to their being contacted and their records obtained.

Ager's rationale can be questioned. Some of the court's fears assume questionable conduct by counsel or practical problems that may not exist. The decision, however, may be correct in many situations. If an opposing party cannot discover expert consultants' opinions, what proper purpose is served by disclosing the consultants' names?

Comparable Information

The second question under Rule 26(b)(4)(B) is what constitutes the "exceptional circumstances" under which a court will permit discovery regarding the facts known or opinions held by experts who are not expected to testify at trial? In deciding whether "exceptional circumstances" have been shown, courts generally weigh

whether the party seeking discovery can gain comparable information another way and whether the information sought is crucial to the case. When the party seeking discovery has readily available alternatives, courts regularly deny discovery from expert consultants. *Inspiration Consolidated Copper Co. v. Lumbermen's Mut. Cas. Co.*, 60 F.R.D. 205, 210 (S.D.N.Y. 1973).

Even when the consultant's information is relevant, a court may find that the party seeking discovery does not need the information enough to warrant discovery. For example, in *Crockett v. Virginia Folding Box Co.*, 61 F.R.D. 312 (E.D. Va. 1974), an employee brought a Title VII class action against an employer. The employee sought discovery of an expert consultant retained by the employer to evaluate aptitude tests administered by the employer. The employee argued that discovery from the expert would show that the employer had prior knowledge of the invalidity of its test. The court denied the discovery, reasoning that the prior knowledge evidence would not be "of substantial use" in resolving the issues in the case. *Id.* at 320-321.

More Liberal

In *Pearl Brewing Co. v. Joseph Schlitz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex. 1976), the court adopted a more liberal view toward discovery of experts not expected to testify. The plaintiffs had employed expert consultants to create and run computer programs to support its case. The plaintiffs' expert witness relied, in part, on the computer output for his testimony. *Id.* at 1134. The defendant sought discovery of computer systems documentation, depositions of the nontestifying computer experts, and production of alternative computer programs that were considered but rejected. The court granted discovery of the computer system's documentation and allowed depositions of the nontestifying experts. *Id.* at 1138-39. It found that the testifying expert could not otherwise be adequately cross-examined about the computer programs on which he based his opinion, and that the defendant's expert would have to spend an enormous amount of time to understand the computer program printouts that were voluntarily produced. The court did not allow the defendant to ask the plaintiffs' consultants about alternative computer programs that were considered but rejected, because it found that the defendant could discover all the relevant information about them from the plaintiffs' expert witness. *Id.* at 1140.

The ambiguities of Rule 26(b)(4) provide little help for lawyers trying to protect against unwarranted disclosure. If possible, however, the best rule to assume is that everything given or told to an expert witness may be discoverable. This may make it more time-consuming for counsel to prepare an expert, but there are grave risks from not applying this rule.

Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977) illustrates those dangers. One of Kodak's attorneys gave the company's testifying experts access to notebooks he had prepared for trial. The notebooks consisted of his "synthesis of the facts and factual issues," representing his "'legal analysis, mental impressions and . . . legal judgment as to what facts were needed to be understood, mastered, and possibly presented in the trial of the *Berkey* case.'" *Id.* at 614. Berkey Photo sought discovery of the notebooks.

The court denied discovery of the notebooks because it doubted whether they played a major role in the formulation of the expert's opinions and because "given the current development of the law in this quarter, it seems fair to say that counsel were not vividly aware of the potential for a stark choice between withholding the notebooks from the experts or turning them over to opposing counsel." *Id.* at 617. But the court gave a clear signal for the future. Lawyers are at risk if they disclose any otherwise privileged information to an expert witness:

> In this spirit, this court notes now, with hindsight, that there is not a compelling rationale for the view that counsel may (1) deliver work product to an expert or other witness to be "useful to the client," but then (2) withhold the material from an adversary who seeks to exploit the fact of this assistance in cross-examining the witness. From now on, as the problem and the pertinent legal materials become more familiar, there should be a sharp discounting of the concerns on which defendant is prevailing today. To put the point succinctly, there will be hereafter powerful reason to hold that materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties.

Id. at 617.

Federal Rules of Evidence 612 and 705 may also require disclosure of information an attorney gives an expert witness. If the witness uses the document to refresh his recollection before testifying, the court may require its production for the opposing party under Rule 612. Under Rule 705, a court may require an expert witness to disclose the facts or data underlying his opinion before he states his opinion on direct examination. In any event, the underlying facts and data may be elicited on cross-examination, and arguably they must be provided in the form in which they were transmitted to the expert.

Paper Trail

A problem similar to that in the *Berkey* case often arises in pretrial motion practice. To support or oppose such motions, lawyers often submit their experts' affidavits. The easy way to draft such affidavits is to ask the expert to do a first draft for later revision by counsel. Alternatively, the lawyer may do a first draft and ask the expert to revise it. Either way, the lawyer and the expert create a paper trail effective for cross-examination. Opposing counsel will seek to obtain the drafts and, if successful under the *Berkey* rationale, cross-examine the expert on each change from one draft to the next. Such cross-examination is at least embarrassing, and it can be worse.

An expert's report on his research and conclusions poses similar difficulties. Such reports may be discoverable. Written reports tend to take on a life of their own,

(Please turn to page 64)

understanding will Direct ye as to them."

The law is not what it used to be. Unless the jury is instructed so that it is able to render its verdict in accordance with the law, trial by jury is little better than mob rule. Yet this fact seems to have had little influence on instruction ritual. The legal process, while going to great lengths to insure that juries will be representative and free from bias and extraneous influence, has not protected them against confusion and misunderstanding.

This state of affairs depreciates the justice system. It makes juries susceptible to appeals, passion, and prejudice and lessens confidence in the results of jury trials. It is clearly not in the interest of the trial lawyer and the lawyer's client. Advocacy is an appeal to reason, to common sense, and to those instincts that animate man's sense of justice. A jury confused by its task and resentful of its lack of understanding cannot be counted on to respond to advocacy of a high order.

Experts: Fundamentals

(Continued from page 9)

posity. You should tell them that a good expert admits when he is uncertain, acknowledges he has erred in the past and doubtless will in the future, and concedes indisputable facts even when they are adverse. Point out that a good expert cannot be goaded into taking positions he has not considered carefully before assuming the witness stand.

Next, review the expert's testimony with him, finding out what he has to say, how it can best be phrased, and what questions you should ask to elicit that testimony. You should consider whether the expert's testimony can be enlivened or made more comprehensible with demonstrative evidence such as charts, graphs, or slides. If you decide to use such aids, the expert should prepare them or at least assist in their preparation.

The structure of the expert's testimony is very important. At the outset, of course, you must qualify the expert. In most jurisdictions this involves demonstrating that the subject matter of the testimony is an area in which the trier of fact will benefit by some assistance and that the expert has the training, skill, or experience to provide that assistance.

Unless the substance of the testimony will not be disputed or the expert's credentials are unimpressive, the expert's qualifications should be set before the jury or judge in loving (but also lively) detail. In view of the impact that such matters have on those who weigh credibility, do not surrender your opportunity to parade your expert's pedigree nor accept a stipulation as to qualifications unless the expert's credibility definitely will not be challenged.

Qualifications aside, the expert's testimony should be organized like an assault on Mt. Everest: first, climb the mountain; second, plant a flag at the top; and third, climb down. In climbing up, the expert should detail all the preparation, study, experimentation, rejection of alternative conclusions, and analysis that he has undertaken to formulate his conclusions or opinions. The flag at the pinnacle is the expert's statement of his opinion. In climbing down, the expert may explain the basis or reasons that support his conclusion. Taken in this order, the expert's testimony will be understandable and will lend credibility to his conclusion.

Once you have formulated the basic outlines of your expert's testimony, rehearse it with him. Rehearsal is particularly important if you use visual aids with the testimony. If the expert has mannerisms or speech patterns that may detract from his credibility, a videotape practice session is often helpful. You then can review the videotape with the witness to improve the presentation, and repeat the drill to refine the expert's testimony to a simple, persuasive performance. Similarly, you should try to anticipate cross-examination and prepare responses to predictable areas of inquiry.

Having followed all these fundamental guidelines, you and your expert should be well prepared for the rigors of trial. Your expert will be, as he should be, a convincing salesman for your position. And you will be equipped to deal with the opponent's experts as well. After a few trials with expert witnesses, you will be the expert.

Discovery of Experts

(Continued from page 16)

cementing an expert's opinion into a mold that may be inconsistent with the facts. All human beings, including experts, are also liable to use inartful phrases or words upon occasion. Infelicitous phrases in an expert's written report are unnecessary holes below his water line.

The safest course is to ask an expert not to put anything into writing unless absolutely necessary. If you need an affidavit from an expert, ask him to tell you his opinion and the bases for it. Draft the affidavit yourself. Read it to the expert. Get his approval. Give him only the final draft to sign. All other drafts might be protected by the work product doctrine. As the Supreme Court recently stated, "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981). The same is true with getting an expert's report. Get it orally.

In principle, if an expert's written statement to you is discoverable, his oral statement should be as well. But as a practical matter, the expert will not remember for any length of time the exact terms of his oral statements.

Despite the addition of Rule 26(b)(4) in 1970, problems with discovery of experts still plague the federal courts. Nevertheless, by withholding from your experts all otherwise privileged material and by avoiding unnecessary written communications from and to an expert, you can sidestep many of the serious pitfalls.

- reserve all objections except as to form & question for trial
- object to vague, misleading or compound question
- privilege (atty-client, work product → don't answer